No. 22228

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONROE STREET PROPERTIES, INC., an Arizona corporation,

Appellant,

vs.

ORVILLE S. CARPENTER, TRUSTEE, etc.,

Appellee.

Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLEE

MARK WILMER
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STATEMENT OF THE CASE

Appellant's Statement of the Case is reasonably accurate but it is incomplete. The offer made by Western Equities of March 27, 1962, (Exhibit A to the Complaint T.R. 5) was expressly conditional:

"This offer is subject to:

* * * * * *

(2) Verification by Union Title Company that the ten first mortgages on the above described property are valid first mortgages * * *

* * * * * *

(5) The Western Equities, Inc. stock shall be taken as investment stock without plans for redistribution * * *

(8) Sellers hereunder shall provide, at their expense, a Title Insurance policy in favor of Western Equities, Inc. with a face amount of not less than One Million ($1,000,000.00) Dollars."

The escrow referred to by appellant (Exhibit B to the Complaint T.R. 8) was conditioned as was the offer, except that item (8) above was not repeated.

The letter of April 10, 1962, (T.R. 101) signed by James E. Mack as Vice President of Union Title Company says only that the notes and mortgages have been deposited in escrow and that " * * * upon the performance by Western Equities, Inc. of all its obligations, in accordance with the escrow terms, we will issue our endorsed title insurance policies insuring each of the mortgages described therein as first lien mortgages."

This does not constitute "verification" that these mortgage liens would be first liens and indeed, such could not be verified.

On May 7th, 1962, pursuant to request, Union Title Company forwarded to Attorney Richard B. Snell, Attorney for Western Equities, Inc., its preliminary title report. A verified copy of this title report was attached to the affidavit of Richard B. Snell which was a part of appellee's Motion for Summary Judgment as Exhibit A. (T.R. 42 et seq.) This report was made as of April 24, 1962.

From this preliminary title report it appeared that the various parcels of real property were, inter alia:

1. Subject to a mortgage to Phoenix Downtown Parking Association, Inc.

2. Subject to a mortgage to General Trust Corporation.

3. Subject to a mortgage to Gilbert & Sullivan Mortgage Company.

4. Subject to a mortgage to Blaine B. Shimmel.

5. Subject to a mortgage to Jefferson Standard Life Insurance Company.

6. Not even then owned by the purported mortgagor.

7. Subject to an attachment by the First National Bank of Arizona.

This was the only "verification" that the liens would be first liens ever tendered to Western Equities by appellant or upon its behalf.

The letter of Ira Broadman, as attorney for appellant of June 27th, 1962 (Exhibit B, Motion For Summary Judgment, T.R. 42, et seq.) which stated that the appellant "had fully complied with the terms of the escrow" set a deadline of June 29, 1962 for Western Equities to surrender over to Union Title Company $1,000,000.00 worth of its stock or " * * * we will necessarily conclude that your failure to deliver constitutes a repudiation of the contract * * * "

As a part of appellee's Motion for Summary Judgment an affidavit of Marie Peipelman, Senior Title Officer of Transamerica Title Insurance Company, was attached to the motion. On the hearing May 29, 1967, the title reports upon which this affidavit was based were admitted in evidence by stipulation as Exhibit A. (Transcript May 29, 1967 hearing, p. 8)

This affidavit and the title reports showed the condition of the title of the property to be mortgaged as of March 28, 1962, the date of the contract, July 2, 1962 (two days after the Broadman deadline), and March 7, 1967 (current ownership). Without burdening the Court with a recitation of the many liens and clouds upon the property, it is sufficient to say that as to both March 28, 1962, and July 2, 1962, the title was in a hopeless mess and appellant could under no circumstances have performed. Some of the lots were not even owned by appellant. Seven of the parcels were in a mortgage foreclosure suit in Maricopa County to satisfy a $225,000.00 indebtedness and all were heavily further encumbered.

This affidavit and title report also disclosed:

(a) That on May 31, 1962 Metropolitan Trust (the mortgagor under the March 27, 1962 contract mortgaged several of

the parcels to J. L. Wright and Orvel M. Johnston for $175,000.00 and that this mortgage was foreclosed on October 26, 1965.

(b) Metropolitan Trust mortgaged parcels of this property to James R. Burger and Nellie Jean Burger, his wife, for $40,500.00 April 9, 1964.

(c) Metropolitan Trust mortgaged parcels of this property to Continental Fidelity Company for $36,500.00 January 10, 1963.

(d) Metropolitan Trust mortgaged parcels of this property to Southland Management Ltd. for $500,000.00 June 11, 1964.

(e) Metropolitan Trust mortgaged parcels of this property to E. D. Tway for $50,000.00 April 9, 1964.

The record also discloses most of the same encumbrances and clouds (including no ownership) as appeared as of July 2, 1962, were still burdening the property.

Inasmuch as appellant assigned as error the consideration of this affidavit (Marie Peipelman) as "hearsay and opinion documents * * and do not conform with the requirements of Rule 56(e) Federal Rules of Civil Procedure" (Specification of Error III, p. 7 App. Op. Br.) and has argued the point (p. 18 et seq. App. Op. Br.), a further statement outlining the matter before the District Judge to be considered by him, by stipulation of counsel for appellant, is required.

On February 28, 1967, appellee served and filed certain interrogatories upon appellant. (T.R. 16) Among them were the following:

"4. Please state the assets owned by Monroe Street Properties, Inc. on March 27, 1962 and continuing through July 1, 1962.

"5. Please state the obligations, contingent or liquidated, which were owed by Monroe Street Properties, Inc. on the dates March 27, 1962 through July 1, 1962.

"6. Please state the obligations against each of the parcels of real property described in plaintiff's complaint and which were alleged to have been the subject of a first mortgage to be sold to Western Equities, Inc. including whether or

not the same was delinquent and if secured by liens, please state the names of the lienor, the lienee and other factors disclosing the amount and character of the indebtedness against each of said properties.

"7. If the obligations and liens against each of said lots appeared of record as prior to the lien of the mortgage proposed to be sold to Western Equities, Inc., please state the source of the funds to be used by Monroe Street Properties, Inc. in discharging such prior lien."

On March 15, 1967, appellee's counsel wrote appellant's counsel advising that answers were past due and requesting an early response. On April 18, 1967, appellee again reminded appellant that the answers were long past due. On May 15, 1967, appellee filed a Motion to Require Answers to Interrogatories to which copies of the two letters above were attached. (T.R. 20) This was the date set for hearing appellee's Motion for Summary Judgment and the continued default by appellant in answering the interrogatories made it necessary that appellee request a continuance of the hearing until the answers had been filed, since certified copies of the documents referred to in the Peipelman affidavit were not attached to the motion as required by Rule 56(e) Federal Rules of Civil Procedure. (Transcript Hearing May 29, 1967, p. 8; Hearing July 27, 1967 p. 3 et seq.) The interrogatory in question 6 required plaintiff to state the liens, etc. against each parcel of property which was to be mortgaged to obviate the necessity for obtaining the great number of certified copies which would be required for a literal compliance with Rule 56(e).

The Court continued the Summary Judgment Motion to May 29, 1967 and ordered "that counsel for pltf. file answers to the interrogatories fully and completely and under oath according to Rule 33, FRCP." (Docket entry, May 15, 1967. T.R. 166, 167)

On May 29, 1967, the answers were still not filed. The Court ordered "You (Bickart) answer the interrogatories by three o'clock this afternoon. We'll clear the record and hear this matter then."

At three o'clock the following proceedings were had. (Quoted in part. See Transcript of May 29, 1967, hearing)

"THE CLERK: Civil No. 6151, Monroe Street Properties vs. Orville S. Carpenter, Trustee for the Reorganization of Westec Corporation, for hearing of pending motions.

"MR. WILMER: If it please the Court, there are a couple of preliminary matters.

"Counsel has handed me proposed answers to interrogatories, on the basis that they will be signed. I understand counsel will agree that the report of Marie Peipelman as to the condition of the title on the three dates shown is accurate. He does not agree, however, as to my statement this morning as to when the closing date was.

"MR. BICKART: Well, Mr. Wilmer, let me make myself clear.

"As I read the affidavit of Marie Peipelman, besides the recitation of her finding certain encumbrances and liens at varying times during her searches, there are other matters contained in the affidavit, matters of opinion. And my understanding with Mr. Wilmer is that I am agreeable for the purposes of the presentation of this motion that on certain dates there were given encumbrances against the properties, some of which were contained in Miss Peipelman's affidavits, some of which were contained in Exhibit A attached to this motion, and also referred to in the responsive affidavit of Mr. Mack, in response to his motion.

"MR. WILMER: Are you agreeable, Mr. Bickart, to my filing the title report itself with respect to these three dates?

"MR. BICKART: In lieu of certified copies, do you mean?

"MR. WILMER: Yes.

"MR. BICKART: I would have no objection to them, if I were provided copies of them in advance.

"MR. WILMER: Well, I offered them to you this morning Mr. Bickart.

"MR. BICKART: Yes. I said I would like to see copies of them.

(Handed to counsel)" (pp. 4 and 5, Transcript. May 29, 1967, hearing)

"THE COURT: Don't they show actually the record of the

title of the properties up to the time the cause of action arose or was instituted?

"MR. BICKART: Certain of the reports at various times do show the status of the title of the property at the time of the contract in question.

"The memorandum report attached to Mr. Wilmer's motion, marked Exhibit A, does that. We have no argument with that, as a memorandum of title report.

"THE COURT: I take it the title reports are in support of that.

"MR. WILMER: Your Honor, the title reports are of three dates: March 28, the date the letter was signed; July 2 of the same year, which is about two days after the letter from Mr. Broadman demanded compliance on the part of Western Equities, showing the title as of that date; then also the title as of today and another as of two months ago. We don't ask counsel to stipulate other than that. As a factual matter, these are the true facts as to the title; as to its relevancy and materiality, that's a matter of argument.

"MR. BICKART: That's a matter of evidentiary properness to be determined by the Court. I would stipulate that they are matters of record, to avoid the necessity of certified copies having to be provided in accordance with the rule.

"THE COURT: Very well, they may be received." (pp. 7 and 8, Transcript May 29, 1967, hearing.)

Prior to presentation of argument on the Summary Judgment Motion these further proceedings were had. (pp. 8, 9 Transcript May 29, 1967 hearing):

"MR. WILMER: There is one other matter, with respect to the proposed answers to the interrogatories, there is presently a motion pending to require full and complete answers to the interrogatories. We would ask the Court to continue that motion for a couple, three weeks, to see if it is needed that we insist that there be full and complete answers. It may be that is not required, if in fact other matters are available.

"THE COURT: No objection to continuing that, I take it?

"MR. BICKART: I don't understand, which motion?

"MR. WILMER: The motion to require—complete answers to the interrogatories heretofore filed.

"MR. BICKART: Fine. No objection.

"MR. WILMER: Then I take it we may present the matter as if these had been signed for?

"MR. BICKART: Yes. You mean the proposed answers that I gave you?

"MR. WILMER: Yes.

"MR. BICKART: Yes, and those we submitted.

"THE COURT: That motion may be continued to June 26."

On June 26, 1967, the motion was continued to July 3, 1967. (Docket entry June 26, 1967, T.R. 166, 167)

On June 27, 1967, appellant's counsel filed an affidavit stating in effect that he had answered the interrogatories June 1, 1967, and "that said Motion is now moot." (T.R. 24)

On June 30, 1967, counsel for appellee wrote appellant that he did not agree and that he proposed to present the Motion the following Monday. On Monday, July 3, counsel for appellant did not appear and, after hearing counsel for appellee, Judge Craig ordered: (Docket entry, July 3, 1967, T.R. 167)

"It is ordered that counsel for pltf secure and file with this court answers to the interrogatories heretofore propounded by the defts and that such answers be with particularity and that they be filed with this Court not later than Monday, July 17, 1967. Failure to comply with this order will result in an order granting motion for summary judgment forthwith."

Appellant was promptly notified of the order. (T.R. 34 et seq.)

The interrogatories as filed and the answers as filed June 1, 1967, are set forth in Appendix A hereto.

On July 5, 1967, appellant filed a "Motion to Vacate Order Requiring Full Answers to Interrogatories." (T.R. 28) A Response thereto was filed by appellee, citing the record as demonstrating that appellant's representations to the Court as to what the record was, were untrue and pointing out with particularity wherein the answers as filed were wholly inadequate. (T.R. 34)

These motions came on for hearing July 25, 1967. Appellant did not then ask for further time to answer the interrogatories and had made no effort to comply with the Court's Order of

July 3, 1967. After hearing the parties at some length the Court denied the Motion to Vacate its Order of July 3, 1967 and granted appellee's Motion for Summary Judgment. (Transcript July 25, 1967, hearing p. 15) The Court ordered Findings of Fact and Conclusions of Law and thereafter amended the Findings and Conclusions proposed by appellee and entered its Findings of Fact and Conclusions of Law August 11, 1967, and on August 15, 1967 the Clerk entered Judgment dismissing appellant's Complaint on the merits.

REPLY TO ARGUMENT UPON SPECIFICATIONS OF ERROR I AND II

"I. The trial court erred in granting appellee's Motion for Summary Judgment in that the pleadings, affidavits, interrogatories, and exhibits of record disclose that material issues of fact exist."

"II. The trial court erred in granting appellee's Motion for Summary Judgment in that by so doing, the court tried disputed issues of fact."

Appellant overlooks or ignores the requirement of Rule 56(c) Federal Rules of Civil Procedure that the fact issue which denies the Court power to enter summary judgment must be as to a *material* fact.

There is no dispute in the record as to the following *material* facts.

1. Union Title Company did not (and could not) verify to Western Equities that the liens were or would be "first mortgage liens." While Mr. Mack wrote on *April 10th* that Union Title would insure the liens as first liens, the preliminary title report from Union Title reporting on the state of the title to these parcels as of *April 24, 1962* showed the property hopelessly encumbered and that in fact some of it was not even owned by Metropolitan Trust (the proposed mortgagor) or Monroe Street Properties.

2. Monroe Street Properties owned no assets other than these

ten notes and mortgages. (Answer to Interrogatory 4, of Interrogatories filed February 28, 1967. (T.R. 18)

3. Monroe Street Properties did not loan any money or give other consideration to Metropolitan Trust for the notes and mortgages—it was simply a paper transaction. (Answer to Interrogatory 2, Interrogatories to plaintiff (Set 2) (appellant) filed July 10, 1967. T.R. 115)

4. Despite the fact that the stock of Western Equities was to be taken as "investment stock" appellant intended to utilize this stock to acquire title and to clear liens, etc. from the property.

> "***as to those requirements which necessitated the payment of monies, that suitable arrangements had been made by Union Title Company and appellant *to satisfy said requirements by utilization of the stock to be delivered by appellee.*" (Emphasis added) (App. Op. Br., p. 13)

5. Appellant did not and could not tender into escrow the first lien mortgages required before demanding performance by appellee.

6. Subsequent to its demand for performance by Western Equities, Monroe Street Properties did not either sell the notes and mortgages for the account of Western Equities to establish its loss or hold said notes and mortgages to maintain its ability to perform.

7. The mortgages from Metropolitan Trust to Monroe Street Properties were never recorded and Metropolitan Trust mortgaged the properties to other mortgagees.

8. As of March 7, 1967, the properties were owned by Union Title Company, as trustee, *in Receivership,* Southwest Savings & Loan Association and C. C. Fabric and Ann D. Fabric, his wife.

8. After the Broadman letter of June 27, 1962, demanding performance by Western Equities by June 29, 1962, appellant made no further effort to consummate the agreement and no demand for performance or claim of right to damages until this suit was filed October 21, 1966, about three and one half weeks after the Reorganization Proceedings in the Federal Court at

Houston, Texas had placed Western Equities (Westec) in Trusteeship.

9. If the properties to be mortgaged were in fact worth $1,625,000.00 as required by the contract and the purchase price for $1,250,000.00 face value of first mortgage lien notes was only $1,000,000.00 appellant suffered no damage or loss.

The assumption by appellant that promissory notes secured by a realty mortgage under Arizona law amount to an interest in real property is unwarranted by Arizona decisions. This asssumption failing, appellant's whole case fails, for appellant rests its entire argument upon the principle that *a vendor of real property* may perfect title any time prior to conveyance.

In *Steinfeld v. State,* 37 Ariz. 389, 294 P. 834 (1930), the Arizona Supreme Court, in considering the relative interests possessed by a mortgagee and mortgagor in realty for the purposes of real property taxation, held that property is to be assessed to the legal owner at its full cash value regardless of whether it is subject to an encumbrance. In that case the Court stated:

> "It is the well-settled rule of law in many jurisdictions, among them being Arizona, that a mortgage is not a conveyance, and neither the legal nor equitable title passes to the mortgagee. *On the contrary, it is nothing but a lien for the security of money or some other condition,* and the title to the property remains in the mortgagor until foreclosure. . . .
>
> " . . . [I]f there should be an attempt to tax the mortgagee's interest, the latter tax would not be on the land, but on the debt. (Territory v. Delinquent Tax List, 3 Ariz. 179, 24 P. 182.) . . .
>
> *"The position of the state would be strong were a mortgage held to create an interest in the land itself, or were only the equity of the mortgagor assessed to him. As we have pointed out this is not true in Arizona.* The tax is assessed on the theory that the entire interest in the land belongs to the Mortgagor and not to the mortgagee, and that the mortgage can only be taxed, if at all, as a debt, and that *its situs for taxation is not where the land lies, but in the personal residence of the mortgagee. . . . "* 294 P. at 836 (Emphasis added.)

In *Mortgage Investment Co. v. Taylor,* 49 Ariz. 558, 68 P.2d 340 (1937), the Arizona Supreme Court stated:

> " . . . The title to mortgaged property under our law remains in the mortgagor. The mortgagee's interest is that of a lienor." 68 P.2d at 342

In *Howell v. Wetzler,* 32 Ariz. 130, 256 P. 365 (1927), the Arizona Supreme Court reversed a foreclosure judgment on the grounds that the judgment was erroneous as being conditional and unjust in view of the improbability, of the circumstances therein considered, of anyone bidding on the land. In that case the Arizona Court set forth the above stated rule:

> "Under our law a mortgage is only a lien on the property mortgaged. The title remains in the mortgagor, and upon default the remedy is foreclosure and sale under special execution. . . ." 256 P. at 366

It is clear therefore that certain well recognized rules governing sales of personal property are applicable. They are as follows.

AS A CONDITION PRECEDENT TO MAINTAINING AN ACTION FOR DAMAGES FOR THE BUYER'S BREACH, THE SELLER MUST SHOW PERFORMANCE ON HIS PART OR A PRESENT ABILITY AND READINESS TO PERFORM.

The general rule is set forth in 78 C.J.S., *Sales* § 463, p. 114, as follows:

> "In order to maintain an action for damages for a breach of the contract of sale by the buyer, the seller must show either a performance on his part or an offer to perform, or at least an ability and readiness to perform, or a valid excuse therefor; and it has been held that the seller's failure to perform substantial terms of the contract bars his recovery, even though the buyer's refusal to accept was due to other causes."

In *Vidal v. Transcontinental & Western Air, Inc.,* 120 F.2d 67 (3d Cir. 1941), a buyer under a contract for the sale of used airplanes brought an action for damages alleging breach of the contract by the seller. The seller notified the buyer that the airplanes would be delivered on a certain date and the evidence established that the seller was ready and able to perform as

promised. The buyer did nothing to complete the transaction, did not tender payment on any or all of the machines nor did he request delivery. The lower court entered judgment dismissing the complaint and the judgment was affirmed on appeal. The third circuit held that it was the buyer's duty to make some offer of performance to put the seller in default before the buyer could sue the seller for breach of the contract. The Court stated:

> " . . . Has either a right against the other? Payment and delivery are concurrent conditions since both parties are bound to render performance at the same time. Restatement, Contracts, § 251. *In such a case, as Williston points out, neither party can maintain an action against the other without first making an offer of performance himself.* Otherwise, if each stayed at home ready and willing to perform each would have a right of action against the other. ' * * * to maintain an action at law the plaintiff must not only be ready and willing but he must have manifested this before bringing his action, by some offer of performance to the defendant. * * * It is one of the consequences of concurrent conditions that a situation may arise where no right of action ever arises against either party * * * *so long as both parties remain inactive, neither is liable* * * * ' It is not an unfair requirement that a party complaining of another's conduct should be required to show that the other has fallen short in the performance of a legal obligation.
>
> " * * * It was the duty of the buyers to make some offer of performance in order to put the seller in default." 120 F.2d at 68 (Emphasis added.)

In *Myers v. Anderson,* 56 P.2d 37, (98 Colo. 394 1936), a seller under a contract for the sale of milk was not permitted to recover damages for breach of the contract where the seller had not shown performance on its part. In that case the seller had not complied with the provision of the contract that a certain *quality* of milk be delivered to the buyer. In holding that the seller's noncompliance with the contractual requirement of quality barred its right to recover damages, the Colorado Court stated:

> " . . . By the contract (the buyer) was not bound to receive and be obligated for milk that later proved to be below the

standard of quality for which he had contracted to pay. It would seem that before (the seller) can be permitted to recover, *he must show a substantial compliance with the contract,* and when, as here, while acting under it, he breached one of its most important provisions, namely, as to the quality of the milk, then (the buyer) rightfully could rescind and decline to accept any further deliveries . . . *in our judgment the uncontradicted evidence discloses that (the seller) failed to comply with the terms of the contract; that on account thereof (the buyer) was relieved therefrom; . . .* " 56 P.2d at 39 (Emphasis added.)

In *Erb v. Flower,* 56 Cal. Rptr. 612 (1967), the California Court of Appeals held that where a seller under an executory contract has rendered himself unable to perform he cannot complain of the buyer's repudiation and cannot recover damages for the buyer's breach if the seller is not able and willing to perform according to the contract.

The Court said:

" ' . . . Hence appellant, by its own hand, put it beyond its power to perform its obligations under the contract. *When a vendor under an executory contract has rendered himself unable to perform, he cannot complain of the vendee's repudiation, and cannot recover upon his offer of performance if he is not able and willing to perform according to the offer.'* " 56 Cal. Rptr. at 613

In *Alexander Kerr & Co. v. Fooks,* 145 F.Supp. 503 (D.C.W.D. Ark. 1956), the United States District Court for the Western Division of Arkansas held that a bottle manufacturer who was clearly unable to perform its obligations as seller under a contract of sale by a specified date, was in no position to complain of the buyer's breach. The Court stated:

"The action of defendant in stopping manufacture of the bottles on July 13, 1953, was a breach of the contract on defendant's part. However, there are two reasons which prevent plaintiff from taking advantage of this breach . . . *Secondly, it would have been impossible for plaintiff to fully perform its part of the contract by July 15, and thus it was in no postion at*

that time to complain of plaintiff's breach." 145 F. Supp. at 511 (Emphasis added.)

See also *Conrad v. Verdusco,* 298 P.2d 638 (Cal. App. 1956).

WHEN AGREEMENT TO PURCHASE IS CONDITIONED UPON FACTS BEING MADE APPARENT TO THE PURCHASER, SUCH CONDITIONS MUST BE MET BEFORE ANY OBLIGATION ARISES UPON THE PART OF THE PURCHASER TO PERFORM.

In 46 Am. Jur., *Sales* § 203, p. 386, the above rule is stated as follows:

> "Performance, or at least an offer or tender of performance, of conditions in a sales contract by the party upon whom the obligation of performing such conditions rests is essential to put the other party in default, in the absence of anything to show waiver of such performance or tender of performance. To put a buyer in default, the seller *must perform or tender performance of conditions.* Where delivery and payment are concurrent conditions, the seller must deliver or tender delivery, in order to obtain a right of action against the buyer. . . . " (Emphasis added.)

In *Canyon State Canners v. Hooks,* 74 Ariz. 70, 243 P.2d 1023 (1952), the Arizona Supreme Court considered the rights of a seller upon breach of a contract for the sale of potatoes. Under the provisions of the contract involved therein, the plaintiff was to appropriate potatoes to the contract and to store them in a designated area until hearing further from the defendant. The Court held that this constituted a constructive delivery and hence, upheld the seller's claim for damages. However, the Court stated:

> " . . . Defendant contends that delivery of the goods and payment are concurrent conditions and if no delivery is made there is no right of action for breach of contract. Sec. 52-542, A.C.A. 1939. While that is a correct statement of the law, it is not applicable because of the evidence in this case . . . Actual delivery here would have been an unnecessary condition since by defendant's agent's own acts, constructive delivery was had." 243 P.2d at 1025, 1026

In *Alaska Airlines v. Molitor,* 285 P.2d 893 (Wash. 1955),

a seller brought an action for recovery of the purchase price upon a contract for the sale of buildings. The contract provided: "If seller is unable to transfer clear title to the property subject to this agreement, within 90 days following the execution of this agreement, then buyer may at his option, declare this agreement cancelled." The plaintiff was notified by the Internal Revenue Service that the sum of $22,500.00 was required to release tax liens on the property. *Plaintiff intended to satisfy the tax liens out of the proceeds of the sale.* Upon notifying defendants of this fact, defendants refused to pay any more funds into escrow and demanded that plaintiff make a showing of its ability to transfer clear title to the property within the period required by the contract. In holding that the seller had not performed its obligations under the contract, the Washington Court stated:

> "Appellants contend the trial court erred in finding that respondent's tender of title complied with the terms of the contract. We agree. *This gave appellants a right to cancel the contract, which they did.*" 285 P.2d at 895 (Emphasis added.)

IF SUBSEQUENT TO A CLAIMED BREACH OF A PURCHASE AGREEMENT BY THE PURCHASER, THE SELLER THEREAFTER DEALS WITH THE PROPERTY THE SUBJECT OF THE SALES AGREEMENT AS HIS OWN AND TREATS THE SALES AGREEMENT AS RESCINDED, SUCH SELLER CANNOT THEREAFTER ELECT TO REINSTATE THE SALES AGREEMENT, AFTER TAKING THE BENEFIT OF SUCH SUBSEQUENT DEALINGS AND SUE THE PURCHASER FOR DAMAGES ON THE SALE PRICE.

Each of the parties to the March 27, 1962, agreement treated the same as rescinded and avoided from June 29, 1962, until the filing of the present lawsuit by plaintiff on October 21, 1966. By failing to record the mortgages and by permitting Metropolitan Trust to subject the property to encumbances as shown by the Peipelman affidavit, appellant became wholly disabled from making a valid tender of said notes and mortgages.

It is fundamental that an unpaid seller of personal property

in which the property has not passed to the buyer, may resell the property for the account of the original buyer or may retain the goods and bring an action for damages. If the latter remedy is elected, the seller must tender performance of all obligations under the contract, as is more fully set forth above. In the instant case, the seller elected to pursue neither remedy upon discovery of the alleged breach, and to the contrary, treated the agreement as abandoned for a period of five years. The seller impliedly abandoned the contract by engaging in conduct inconsistent with the contract rights which are now asserted, and it acquiesced in the repudiation of the contract by the buyer resulting in an abandonment of the contract or implied mutual rescision thereof.

The above rule is set forth in 17 A C.J.S., *Contracts* § 389, p. 467 as follows:

> "While a mere breach of contract by one party is not an offer to rescind, the repudiation of the contract by one party may be treated by the other party as an offer to rescind, upon which he may act, and the latter's acquiescence in the repudiation may result in a rescission of the contract by mutual consent. *So a contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other. . . .* " (Emphasis added.)

The abandonment of a contract for the sale of property, real or personal, has been found to exist in several cases where the parties thereto, after entering into the agreement of sale, perform acts which are inconsistent with the rights vested in them under the contract.

The above rule was applied by the Arizona Supreme Court in *Mason v. Hasso,* 90 Ariz. 126, 367 P.2d 1 (1961). In that case the purchasers of real property under a contract of sale brought an action to quiet title to the property. The purchasers paid $100.00 of a $500.00 down payment, but failed to pay the balance due on the down payment and failed to pay subsequent annual installments under the contract or to pay taxes or interest. Further, the purchasers wrote a letter to the vendors approximately one

year after the date of the contract, stating that they were unable to go through with the deal. The Court held that upon those facts the purchasers had unambiguously abandoned the contract which thereafter was no longer in full force and effect. The Court stated:

" . . . Abandonment means the act of intentionally and voluntarily relinquishing a known right absolutely and without reference to any particular person or purpose. 1 Am. Jur. Abandonment, § 1, p. 4. Forfeiture is distinguished from abandonment in that it is enforced and involuntary and occurs without regard to intention. In the case of Gila Water Co. v. Green, 29 Ariz. 304, 241 P. 307, 308, this Court held:

" ' * * * There is a plain, fundamental distinction between an abandonment and a forfeiture. While to create an abandonment there must necessarily be an intention to abandon, yet such an intention is not an essential element of forfeiture in that there can be a forfeiture against and contrary to the intention of the party alleged to have forfeited.'

"On this same subject in the case of City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411, 418, we stated:

" ' * * * *Abandonment involves an intention to abandon, together with an act or an omission to act by which such intention is apparently carried into effect,* * * * ' " 367 P.2d at 3 (Emphasis added.)

The Court continued:

"Contra to appellants' contention as evidence by item (3) in their assignment of error abandonment requires no act of the other party before it is complete. It is entirely unilateral and the moment the intention to abandon unites with acts of relinquishment, the abandonment is complete. Hull v. Clemens, 200 Or. 533, 267 P.2d 225. Appellants' contention that an abandonment by the purchaser cannot be effective until the vendor elects to accept it as [sic] contrary to the holdings of this Court in the cases of Gila Water Co. v. Green, supra, and City of Tucson v. Koerber, supra." 367 P.2d at 4

In *Twyford v. Twyford,* 243 S.W.2d 930 (Ky.App. 1951), an action was brought by a purchaser for specific performance of a contract for the sale of realty. In affirming the judgment of the trial court which denied specific performance on the ground

that the purchaser had abandoned the contract, the Kentucky Court of Appeals stated:

> " * * * But the law of the case is applicable here. It is, briefly stated, that abandonment of such a contract may be inferred from circumstances or conduct inconsistent with an intention to perform; that equity will not permit a party to sleep over his rights to the prejudice of another on whom he makes claim, and that he must make a demand within a reasonable time for performance. More specifically it is written, 'A purchaser may not lie by and lead the other party to believe that he has abandoned the contract, and then, when the land has increased in value 20 times, claim the benefit of the contract he decided not to claim before the land rose in value.' * * * " 243 S.W.2d at 933

In *Nelson v. Cross,* 152 Neb. 197, 40 N.W.2d 663 (1950), the Supreme Court of Nebraska affirmed the judgment of the trial court which denied specific performance of a contract for the sale of realty. In holding that the contract had been abandoned by the parties, the Court stated:

> " * * * After he obviously knew of Scoville's determination not to perform, plaintiff acquiesced in that decision by not demanding possession or rents during the almost five-year period that elapsed between the signing of the contract and the institution of this action. Clearly if the contract was in force, plaintiff was entitled to possession and rents from the land during Mr. Scoville's life and thereafter—and yet it affirmatively appears that he took no action to collect and did not even claim these rights during that period. The retaining of rents and possession by Mr. Scoville and later by the executor of his estate was clearly inconsistent with material provisions of the contract, and just as clearly plaintiff acquiesced in those acts.
>
> * * * * * *
>
> "We think it clear and without material dispute that this contract was abandoned by the parties in the early months after its execution, and that accordingly the trial court did not err in denying specific performance. We deny it here." 40 N.W.2d at 666-67

In a syllabus by the Court the applicable rule was stated as follows:

> "An abandonment of a contract may be effected by acts of

one of the parties thereto, which are inconsistent with its existence and acquiesced in by the other party." 40 N.W.2d at 663

In *King Realty, Inc. v. Grantwood Cemeteries, Inc.,* 4 Ariz. App. 76, 417 P.2d 710 (1966), the Arizona Court of Appeals applied the above rule in a suit brought for an accounting on an agency contract. In denying the accounting, on the grounds that the contract had been abandoned by the parties, the Arizona Court stated:

"We feel that there was ample evidence from which the court could have found that prior to October 15, 1956, the parties acted and dealt with the subject matter of the contract in a totally inconsistent manner and that the contract was abandoned prior to that time. *Where the acts of one party inconsistent with the existence of a contract are acquiesced in by the other, the contract will be treated as abandoned.* 17 A C.J.S. Contracts, § 389; Wiegart v. Becken, 21 Wash.2d 59, 149 P.2d 929 (1944); Jensen v. Chandler, 77 Idaho 303, 291 P.2d 1116 (1956). * * * " 417 P.2d at 714-15 (Emphasis added.)

In *Annett v. Stout,* 322 Mich. 457, 34 N.W.2d 42 (1948), The Michigan Supreme Court found as a matter of law that a contract for the sale of real property had been abandoned by the parties thereto. In that case a purchaser brought an action to recover a one-half interest in a land contract. The evidence adduced at trial showed that for a long period of time the purchasers were in default in the payment of installments under the contract and in the payment of taxes. It further showed that plaintiff's copy of the contract of purchase had been returned to the vendor. The trial court entered judgment for the plaintiff and on appeal the judgment was reversed. The Court held that as a matter of law there had been an abandonment of the contract of sale. The Court stated:

" * * * On this appeal the question is presented:

" 'Can there be a parol surrender or abandonment by a vendee of his interest in a land contract to the vendor-fee owner?'

"The answer is in the affirmative and we have so held in numerous cases. . . .

" 'Conduct on the part of both the vendor and purchaser which is inconsistent with the continuance of the contract of sale constitutes rescission by abandonment.

'Rights of either party under a contract for sale of land may be lost by abandonment and it is not necessary that relinquishment be in writing as an abandonment may be deduced from circumstances or course of conduct. . . .'

* * * * * *

"In our judgment it clearly appears from this record that there was a surrender and abandonment by plaintiff and Edward Stout of their vendees' interest in the Lee Hotel contract, and that the same was accepted and acquiesced in by the vendor; . . . ." 34 N.W.2d at 43-46

WHERE IT APPEARS THAT THE SELLER WOULD BE WHOLLY UNABLE TO PERFORM AND COMPLETE A PURCHASE AND SALE AGREEMENT, NO DAMAGES CAN BE RECOVERED FROM THE PURCHASER WHO REFUSES TO TENDER PERFORMANCE.

It has been held that a purchaser of personal property or one who undertakes to buy will not be compelled to abide by his promise if the seller offers a title which is open to doubt and challenge or which threatens to involve the buyer in costly litigation. It has also been held that to render a title doubtful within the meaning of the rule, it is not necessary that it be bad in fact; it is enough that the title is so uncertain, clouded by apparent defects, or subject to reasonable misgivings that prudent men, knowing the facts, would hesitate to take it. This was the holding of *Hollywood Plays v. Columbia Pictures Corp.*, 299 N.Y. 61, 85 N.E.2d 865, 10 A.L.R.2d 722 (1949).

In the *Hollywood Plays* case the plaintiffs sued for breach of a contract to buy from them the motion picture rights to a designated play. The plaintiffs derived 50% of their title through a purchase from the trustee in bankruptcy of a former owner of the rights. The schedules filed by the bankrupt in connection with his petition in bankruptcy and the bill of sale later executed by the trustee

both listed the bankrupt's interest in the rights as 25%, and defendant refused to perform the contract on the ground that plaintiffs' title was defective. Reversing the judgment of the court below, the Court of Appeals took the view that the possibility of litigation over one-half of the interest derived by plaintiffs from the bankruptcy sale justified defendant in declining to perform and necessitated a dismissal of the complaint in the suit. In that case the Court stated:

> "A practical problem calling for choice of action, not a theory, confronted defendant and its attorneys. They might either have refused to go through with the transaction or they might have disregarded the palpable flaw in plaintiff's title, accepted it, paid $150,000 for the play and invested another million dollars to screen and produce it. To have pursued the latter course might well have jeopardized the entire investment. *As a practical common-sense matter, no businessman could reasonably be expected to invest so large a sum in a title that might at any moment have generated a lawsuit.* As a legal matter, no court should condemn the course which the defendant actually took. Though there existed the possibility that the buyer's fears concerning plaintiffs' title might later have proved groundless, those fears certainly had substance, founded as they were upon reasonable doubts and uncertainties. 'A prudent purchaser may not be labelled as unduly cautious when he refuses such a title.' Van Vliet & Place v. Gaines, [249 N.Y. at 110]" 85 N.E.2d at 868 (Emphasis added.)

In *Shores Lumber Co. v. Claney,* 102 Wis. 235, 78 N.W. 451 (1899), the seller under a contract for the sale of lumber, brought an action against the buyers for breach of the contract of sale. After the execution of the contract in question the defendant learned that the plaintiff was not the owner of the lumber in question and had no right to sell same. The buyers thereupon refused to give their note as required by the contract until the seller would cure the defect in the title. In preparing the lumber for sale to the defendant, the plaintiff marked the lumber with the defendants' name. When the buyer refused to complete the transaction, the seller planed the defendants' name off of the lumber and entered into a contract to sell the lumber

to a third party. The Court held that the defendant buyers were excused from performance under the contract where the seller tendered defective title to the goods and secondly, that by the inconsistent acts of the seller, the contract had been rescinded. The Court stated:

" * * * Before the delivery of the note for the purchase price by the purchasers, the true owner of the lumber notified them of his claim thereon, and that he would not waive it without payment. *Certainly, defendants were justified in refusing to make payment, under the circumstances in proof, unless plaintiff cleared the title to the lumber. . . .* The contract of the parties, and their acts under it, indicating an attempt to make a present sale and delivery of the lumber, *the vendor could not lawfully compel the vendees to pay for property to which it had no title, or which was encumbered by liens or mortgages . . .* " 78 N.W. at 452 (Emphasis added.)

WHERE THE SELLER HAS NOT ESTABLISHED THAT HE HAS SUFFERED LOSS FROM THE BREACH, HE IS NOT ENTITLED TO RECOVER ACTUAL OR COMPENSATORY DAMAGES.

(a) As a general rule the measure of damages for breach of an agreement of sale by a buyer for nonacceptance of the goods, is the difference between the contract price and the market or current price at the time and place of performance.

The general rule is set forth in 78 C.J.S., *Sales* § 478, p. 137, as follows:

"It is the general rule, either under a provision to that effect in the Uniform Sales Act, which is declaratory of the common law, or apart from, or without reference to, the act, that the measure of damages, on the buyer's refusal to accept and pay for goods sold for which there is an available market, is, in the absence of special circumstances, the difference between the contract price and the market or current price or value at the time or times when the goods ought to have been accepted, ..."

Further, at 108 A.L.R. 1485, the rule is stated:

"However, the general rule seems to be that, on breach of a sale contract by a buyer, the measure of damages is the difference between the contract price and the market value of

the goods at the time and place of delivery, or, as stated in the Uniform Sales Act, at the time when the goods ought to have been accepted." (Citing *inter alia,* United States v. Burton Coal Co., 273 U.S. 337, 47 S.Ct. 351 (1927); Boyles v. Kingsbaker Bros. Co., 5 Cal. 2d 68, 53 P.2d 141 (1935))

(b) Where the consideration to be paid by a buyer under a contract of sale includes property, other than money, the value of the property to be used in computing the seller's damage is the *value of the property at the time and place stipulated for delivery thereof.*

In *Pope v. Mergenthaler Linotype Co.,* 131 S.W.2d 668 (Tex. Civ. App. 1939), an action was brought by the seller of linotype machines to recover damages for breach of the contract of sale by the buyer. Under the contract of sale the buyer was to trade in two old machines as a part of the consideration for the sale. The parties stipulated as to the value of the trade-in machines which stipulated value was in excess of the market value at the time of the sale. In holding that the *value of the buyer's property at the time stipulated for delivery* was to be the basis for the determination of the amount of damages, the Court stated:

"Appellee made no effort, nor was there any evidence tending to show the market value of the machine in question at the time and place of the alleged breach of Pope's obligation to deliver it to appellee, but, for a measure of damages, appellee relied entirely upon the evidence of an alleged parol agreement of a specific value. The trial court submitted the alleged agreed value as the measure of appellee's damages. We conclude that this was error, for under the record as we have stated it, if the breach occurred, *the true measure was the market—or in the alternative, intrinsic—value of the machine at the time and place Pope was obligated to deliver it to appellee. ...*" 131 S.W.2d at 671 (Emphasis added.)

See also *Popp v. Yuenger,* 229 Wis. 189, 282 N.W. 55 (1938) 108 A.L.R. 1498

Stevens v. Mitchell, 51 N.M. 411, 186 P.2d 386 (1947)

Since appellant does not now own the mortgages in question and the property involved is now owned by others, just what

does appellant propose to transfer to appellee in exchange for $15,977,313.45?

SPECIFICATION OF ERROR NO. III

"III. The trial court erred in considering the affidavits of Richard Snell and Marie Peipelman in that said affidavits are at best hearsay and opinion documents, contain the affiants' conclusions of law and do not conform with the requirements of Rule 56(e), Federal Rules of Civil Procedure."

The Snell affidavit served two purposes. First to identify and verify documents. These were the preliminary title report of April 24, 1962, as being the only "verification" received from Union Title Company as to the legal status of the mortgages as "first mortgage liens" and the Broadman letter of June 27, 1962. It served the further purpose of establishing that after the Broadman letter appellant never again made any effort to consummate the contract and that Western Equities considered it as abandoned and rescinded. For this purpose it was a valid affidavit. No dispute exists as to these facts.

The Peipelman affidavit and Title Report, Exhibit A in Evidence (Transcript May 29, 1967 hearing, p. 8) was, by stipulation given evidentiary status (supra p. 7). Any doubt as to the propriety of the Court treating it as such is put to rest by counsel for appellant himself in the July 25, 1967 hearing as follows:

"MR. BICKART: I will quote from my stipulation on the 29th of May, your Honor, with regard to Exhibit A and Interrogatory No. 6:

" 'And my understanding with Mr. Wilmer is that I am agreeable for the purposes of the presentation of this motion that on certain dates there were given encumbrances against the properties, some of which were contained in Miss Peipelman's affidavits, some of which were contained in Exhibit A attached to this motion, and also referred to in the responsive affidavit of Mr. Mack, in response to his motion.'

"That was my stipulation, that the Court could consider those matters found by Miss Peipelman *as matters of record,*

for the purposes of the motion for summary judgment. Now, as a matter of law, we felt that it wasn't material, but—

"THE COURT: So in effect what you are saying, Mr. Bickart, was that, as far as your position is concerned, there's no need to repeat what is already in the record.

"MR. BICKART: Yes, that's right. Mr. Wilmer indicated that it was costly for him to attach certified copies of all these matters of record, and I understood the problem and I said, 'Fine, we'll put in Marie Peipelman's title memorandum reports.'

* * * * * *

"THE COURT: So far as the motion for summary judgment is concerned, do I understand you to say, regardless of whether or not the interrogatories have been answered to the satisfaction of the proponent that there is sufficient material in the file, and the court considers the pleadings—

"MR. BICKART: Yes, Sir.

"THE COURT: —and the exhibits attached and the exhibits put in—

"MR. BICKART: Yes, Sir.

"THE COURT: —dispose of that question.

"MR. BICKART: Yes sir. It is the defendant's position that plaintiff would be unable to have performed its part of the contract because of the condition of title. And Interrogatory No. 6 and the stipulation put in the information relating to the condition of title.

* * * * * *

"THE COURT: The Court was concerned whether it was necessary actually to have further answers, in view of your statement with respect to exhibits.

"MR. BICKART: The affidavits of Marie Peipelman may be considered by the Court. We have no objection to that." (Emphasis added.) (pp. 9, 10, 11 and 15, Transcript July 25, 1967 hearing)

Further answer to appellant on this point seems quite unnecessary.

SPECIFICATION OF ERROR NO. IV

"IV. The trial court erred in making Findings of Fact and Conclusions of Law and in so doing it found facts not con-

tained in the record, nor accurately represented therein and drew conclusions of law contrary to the decisions interpreting such facts. Rule 56(a), Federal Rules of Civil Procedure."

Appellant has failed to point out any Findings of Fact or Conclusions of Law which were improperly made. We will not therefore consider this Specification further. The Court certainly in its discretion may put on the record its reasons for its decision.

CONCLUSION

The Court below might well be affirmed on the basis that appellant had wilfully failed to answer interrogatories fully and completely after being ordered to do so. *Robinson v. Transamerica Ins. Co.* (C.A. Utah 1966), 368 F.2d 37, *Michigan Window Cleaning Co. v. Martino* (C.A. 6, 1949), 173 F.2d 466.

However, the claim of appellant is so plainly frivolous and lacking in merit that a disposition of the claim upon the merits is preferable.

Respectfully submitted,
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By Mark Wilmer
Attorneys for Appellee
400 Security Building
Phoenix, Arizona 85004

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

APPENDIX A

INTERROGATORIES PROPOUNDED TO PLAINTIFF FEBRUARY 28, 1967 AND ANSWERS THERETO

Int.# 1. Is the corporation, Monroe Street Properties, Inc. in good standing at the present time under the laws of the State of Arizona?

Answer — 1. No; however, steps are being taken to reinstate the Charter at present.

Int.# 2. If not, who were the last officers and directors of said Monroe Street Properties, Inc., with their present addresses?

Answer — 2. George W. Switzer, 520 West Clarendon, Phoenix, Arizona, President; Arthur Daniels, Wilcox, Arizona, Secretary/Treasurer.

Int.# 3. What, if any, action was taken by Monroe Street Properties or by its Board of Directors and officers in authorizing the bringing of this litigation? Please attach copies of any minutes, resolutions or other writings embodying the aforesaid corporate action if it is claimed such action was taken.

Answer — 3. A corporate Resolution was passed, after Waiver of Notice of Meeting, authorizing the commencement of this action in the name of MONROE STREET PROPERTIES, INC.

Int.# 4. Please state the assets owned by Monroe Street Properites, Inc. on March 27, 1962 and continuing through July 1, 1962.

Answer — 4. Ten mortgages and notes upon the property described in plaintiff's Complaint as executed and deposited in Escrow No. 115185.

Int.# 5. Please state the obligations, contingent, or liquidated, which were owed by Monroe Street Properties, Inc. on the dates March 27, 1962 through July 1, 1962.

Answer — 5. Unknown.

Int.# 6. Please state the obligations against each of the parcels of real property described in plaintiff's complaint and which

were alleged to have been the subject of a first mortgage to be sold to Western Equities, Inc. including whether or not the same was delinquent and if secured by liens, please state the names of the lienor, the lienee and other factors disclosing the amount and character of the indebtedness against each of said properties.

Answer — 6. Please refer to the public records of the Maricopa County Recorder.

Int.# 7. If the obligations and liens against each of said lots appeared of record as prior to the lien of the mortgage propposed to be sold to Western Equities, Inc., please state the source of the funds to be used by Monroe Street Properties, Inc. in discharging such prior lien.

Answer — 7. Funding was to be obtained by Union Title Company for the purpose of consummating the escrow between MONROE STREET PROPERTIES, INC., and WESTERN EQUITIES, INC.

TABLE OF CASES AND AUTHORITIES

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